No. 15669

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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HARRY JOSEPH,

*Appellant,*

*vs.*

DONOVER COMPANY, INC., a corporation; HARRY J. O'DONNELL; RALEIGH CHINN; KINZUA CORPORATION, a corporation; MARK F. MATHEWSON and RICHARD K. BUSH, Trustees in Dissolution of CAPITAL TIMBER PRODUCTS COMPANY, a corporation; CAPITAL TIMBER PRODUCTS COMPANY, a corporation; ALVIN SCHWAGER; E. W. STUCHELL; D. E. WYMAN and M. H. WYMAN,

*Appellees.*

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## PETITION FOR REHEARING.

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## TOPICAL INDEX

## TABLE OF AUTHORITIES CITED

### Cases

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### Statement of Grounds for Petition for Rehearing.

This petition for rehearing by appellant is upon the following grounds:

1. Appellant respectfully submits that this Court erred in its original opinion herein in not considering as controlling or vital the admissions of appellees. It was upon these astonishing and decisive admissions that this appeal was founded and taken; yet the original opinion is principally devoted to the infinitely less important question of the express conversations of the evening of November

18, 1952. Indeed, it refers to the question of the reaching of an express agreement on that date as the "very heart of the case" (Slip Opin. p. 8).

2. Appellant further submits that this Court erred in its original opinion herein in fixing and employing a far more rigid standard of proof for existence of joint venture than that employed by the Oregon law which ought properly to be followed by the Federal courts in this cause based upon diversity of citizenship. (For convenience, the first and second point will be argued together.)

3. Finally, appellant urges that the general and Oregon law requires that such an opportunity as plaintiff here disclosed to defendant O'Donnell for mutual investment not be wrested away from plaintiff against his will; and that the law requires this even aside from and regardless of the proved intent of the parties to enter into the deal together.

I and II.

**This Court Is Asked to Reconsider the Erroneous Factual and Legal Basis of Its First Opinion Herein.**

To speak plainly, we feel and urge that this Court focussed too sharply both at the time of oral argument and in its opinion, upon a small aspect of this case, to the almost complete exclusion of the more important parts.

As the writer of these particular words, counsel Lawrence Steinberg, believes, he has been at fault in this regard because, having failed despite specific advance motion to secure the additional time required to argue this complex case, he failed to force the course of oral argument away from the narrow topic of the conversation of November 18, 1952. This topic occupied the attention and

questions of the Court on oral argument to a very high degree. Said counsel was thus unable to place before the Court on oral argument either the large factual charts or the oral presentation which formed the true basis of appellant's cause. These were directed to the total conduct of the parties before and after November 18, 1952, and to the controlling judicial admissions contained in the testimony of appellees themselves.

The written opinion speaks incorrectly of the testimony as to the conversation of November 18, 1952, as being "the very heart of the case" (Slip Opin. p. 8). It then goes on to say that the trial Court did not need to agree with Joseph's version of the conversation.

Let us assume here, for discussion, that the Court was correct in its conclusions as to the force of the evidence concerning that conversation. (In point of fact, we think that the zig-zag path through amnesia and untruthfulness of Chinn and O'Donnell, covered for example at pp. 61-65 of App. Op. Br., together with inability to make any denial of Joseph's testimony, graphically affirm Joseph's testimony; but we pass that point here.) Even if the conversation be held to be as O'Donnell wishes, appellant's position of strength on this appeal is unaffected.

For this Court's opinion, going beyond the single conversation, deals most limitedly with review of the findings. Appellant's case for conduct and admissions as establishing joint venture is regarded as countered simply by the trial Court's finding that the conduct of the parties after November 18, 1952, did not prove the necessary agreement.

Yet is not the question here simply this—does a detailed factual examination on the whole record of the basis for such findings, if there be a basis, support the view that

the finding is other than clearly erroneous? (Preliminarily, we ask the court to note the striking paucity of supporting citations to this finding by appellees in their Appx., pp. 48-49).

Finding XIII, and sub-paragraph 3 thereof especially cited in the Court's opinion (Slip Opin. p. 5), is conclusionary in character and cannot successfully float in the air, lacking foundation and support.

We regret very strongly that the Court did not in its opinion deal in detail with the question of the factual support, or lack of it, for the finding that *conduct* of the parties did not prove an agreement and existence of a fiduciary relationship. We urge that detailed factual examination of this question, of basic admission of appellees, and of the absence of support for the finding, would lead the Court to a broad consideration of the issues raised by this case, and to an opposite result.

The evidence, and the very findings of the trial Court itself (insofar as they relate to really factual rather than conclusionary matters), leads inevitably to the view that the conclusionary finding and conclusions of law based thereon are clearly erroneous and unsupported.

While legal principles are also called into play, this case is in certain senses profoundly factual. Determination of the question whether findings are clearly erroneous must necessarily depend upon actual examination of large numbers of facts in the record. Fortunately, this is rendered much easier in the instant case by the fact that so many vital facts are clear and undisputed—even, often, stated as findings of fact by the trial Court itself.

In our Petition for Rehearing, we cannot of course go into the full detail of the record, or even of our efforts to summarize it in our earlier briefs. But we wish to

point out some basic, vital and fundamental facts herein which are unchallenged and which leave shattered and destroyed the tenuous fabric of the conclusionary findings herein drawn in favor of defendants, and unfortunately regarded as binding in this Court's original opinion,

* * * * * * * * *

**Analysis of Certain Cases Cited by This Courts' Original Opinion.**

The original opinion of this Court appears to lay heavy stress (Slip Opin. pp. 3-5) on such cases as *Bogle v. Paulson* (1949), 185 Ore. 211, 201 P. 2d 733; *Preston v. State Industrial Acc. Comm'n.* (1944), 174 Ore. 553, 149 P. 2d 957, 960; and *Burnett v. Lemon* (1948), 185 Ore. 54, 199 P. 2d 910.

It is true that not all the seventy-odd cases cited by appellees were specifically covered by appellant in his closing brief. To do so would not only have involved unbearable amounts of detail in that brief, but would have obscured the main and telling point of this case—that the factual admissions of appellees are so striking and conclusive that, under the circumstances of this case, they require reversal under any test of the evidence.

We submit that these three cases are not and cannot be controlling of the case at bar. This case requires to be examined on its own record, in order to show the clearly erroneous character of the basic findings. However, we do now briefly examine into three cases suggested as controlling, in order to show that they are truly inapposite as authorities in the present situation.

*The Bogle Case:* We submit that the *Bogle* case, despite superficial resemblances to the one at bar, is so strikingly and fundamentally different that it should not and indeed

cannot, serve as any precedent against appellant's position. We set out now some of these differences.

1. In the *Bogle* case, plaintiff's story was inherently unlikely, in that allegedly defendant agreed to take all the loss and accept only one-half the property. The opposite is true here; no inequality was claimed.

2. In the *Bogle* case, the defendant did not mislead the plaintiff, did not suppress information and did not write untruthful letters of purported explanation of his conduct. The opposite is true here.

3. In the *Bogle* case, the defendant was deaf and had a hard time knowing what was said in court, thus excusing the unsatisfactory character of his testimony. The opposite is true here.

4. In the *Bogle* case, there was denial by defendant that the deal was brought to him by plaintiff. Here, the defendant O'Donnell had to admit it.

5. In the *Bogle* case, the parties were truly strangers and not put together by long time associates. The opposite is true here.

6. In the *Bogle* case, there was virtually no corroboration of plaintiff's evidence in any way, nor any genuine admissions by defendant. The opposite is true here.

It was only in the context of such extraordinary and basic differences from the case at bar that the *Bogle* Court, after pointing out that the findings are not binding, and that it was the appellate Court's duty to examine carefully the record for the purpose of determining the truth, affirmed the judgment of the trial Court. Even so, one member of the Court dissented.

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*The Burnett Case:* Similarly, the case of *Burnett v. Lemon* (1948), 185 Ore. 54, 199 P. 2d 910, is basically dissimilar from the one at bar, and cannot be "controlling," as suggested in the original opinion of this Court (Slip Opin. p. 5).

In the *Burnett* case, there were *no* judicial admissions by the defendants tending to show a partnership in the slightest degree. In the instant case, there are overwhelming judicial admissions by defendants themselves. Indeed, in the *Burnett* case there was virtually no corroboration of plaintiff's testimony save certain rather vague *extra*-judicial and disputed admissions by defendant. Despite the weak state of the evidence for plaintiff in that case, the Court relied, in finding that plaintiff had not sustained the burden of proof, on the extravagance under the facts there shown of the claim that partnership extended to ownership as well as operation of the ranch involved.

Of course plaintiff bears the burden of showing the agreement and its terms. But we say it is clear that the burden is met by defendants' own admissions; and under the Oregon cases there is a presumption of equality between the joint venturers unless otherwise shown. This is clear under Oregon law (*Gius v. Coffinberry,* 39 Ore. 414, 65 Pac. 358).

*The Preston Case:* Likewise, the case of *Preston v. Industrial Acc. Comm'n* (1944), 174 Ore. 533, 149 P. 2d 957, holds and says at most that partnership or joint venture is founded upon voluntary intent of the parties. It may be shown by express or implied agreement; and the Oregon law ". . . will regard . . . conduct rather than . . . language in determining whether . . . voluntary associating in a business enterprise amounts to a partnership or not . . ."

But this is what appellant not only concedes but insists upon; and it does no more than highlight appellant's insistence that we must look at what O'Donnell *did* and *admits* he did—and not alone at what O'Donnell says he does or does not remember of a conversation on November 18, 1952. If this case is decided on O'Donnell's testimony as to that evening alone, and such testimony is regarded as the crux of this case (as suggested at Slip Opin. p. 5), then appellant's position of great strength will have been misunderstood, and an inadvertent but nonetheless grave injustice will be done to appellant and his cause.

**When These and Other Admissions of Defendants Are Considered Together, Defendants Stand Condemned From Their Own Faults.**

We set out briefly the documentation of some of the truly damning testimonial admissions of defendant O'Donnell (and often, the actual specific findings), which destroy the case of the defendants. This material is set out in far fuller, and somewhat different, fashion in Appellant's Opening Brief, at pages 32 to 55; we earnestly request the Court's renewed attention to that material.

1. O'Donnell, as he testified and as was found, first learned of the entire Kinzua deal through Joseph and Terman [O'Donnell, Tr. 839, 841; Find., IV(3), Tr. 249].

2. O'Donnell first met the seller's agents at Portland through plaintiff, admittedly and as found [O'Donnell, Tr. 879; Find., IV(3), Tr. 249-250].

3. O'Donnell, as he testified and as was found, reported the financial plan of acquisition to Joseph through O'Donnell's lawyer Dunn, to enable plaintiff to interest the Chicago group [O'Donnell, Tr. 1009, 1710-1711; Find., VI(5), Tr. 256].

4. O'Donnell, as he testified himself, discussed the financing of the Kinzua deal with Joseph on a number of occasions; so too the trial Court found [O'Donnell, Tr. 1681, 1742, 1745, 1785-1786; Finds., VI(5), Tr. 256; VII(3), Tr. 258].

5. O'Donnell, as he testified, told the banks he would "take anything he could get" from Chicago [O'Donnell, Tr. 1702]. Indeed, when questioned in testimony as to the source of funds, beyond the share to be raised by his western group, O'Donnell specified Joseph [O'Donnell, Tr. 1813]. O'Donnell also stated that the Chicago group and O'Donnell were to raise whatever each could, and get together to allocate [O'Donnell, Tr. 3555].

6. O'Donnell reported to Joseph in January 1953, that inspection of the properties was to be done later [O'Donnell, Tr. 1807-1811]. He also reported to Joseph in March 1953, and the Court so found, that the preliminary investigation of the Kinzua properties after the winter was favorable, and that he would investigate further [O'Donnel, Tr. 1840-1845; Find., IX(6), Tr. 263]. Yet he never reported back to Joseph, as he admitted himself and as the Court found, until after the purchase of Kinzua was made in August 1953 [Admitted Fact XXIV, R. 159-160; Find., IX(6), Tr. 264].

7. While O'Donnell did freeze out Joseph from Joseph's own deal, he explained (with almost total untruthfulness) his action in so doing, after the event [Exhibit 93, reproduced with comment in App. Op. Br., p. 59; Find. XI(3), Tr. 269].

* * * * * * * * *

O'Donnell, then learned of and was introduced into the Kinzua deal through, and only through, Joseph and Terman. He discussed with him, intimately, the financing

and physical aspects. He testified himself that the non-O'Donnell money was to come from Joseph, and that he told bankers he was going to get what he could from Chicago (Joseph's headquarters); and further that his group and Chicago were to raise what each could, and get together to allocate. Yet, he concedes, he took the deal, with nothing for Joseph, and without a word to Joseph that he was doing so.

These are facts, not only undisputed, but judicially admitted by defendant O'Donnell himself, and found for the most part by the trial Court. How then can appellees prevail? It is inconceivable; if these facts and the others discussed at pages 32-55, Appellant's Opening Brief, be regarded and analyzed, appellees must lose.

**The Oregon Cases Show That an Appellate Court Is to Reverse a Finding of No Joint Venture on Its Own Independent Judgment Where the Evidence Preponderates in Favor of the Existence of Joint Venture.**

The actually relevant Oregon cases, which this Court under applicable principles is to follow on this diversity of citizenship cause, give short shift to the argument of virtual conclusiveness of a trial Court's finding that no joint venture exists.

Thus, in *Buschke v. Dyck* (1952), 197 Ore. 144, 251 P. 2d 873, the Court unhesitatingly reversed a decree dismissing a complaint, after trial, wherein plaintiff sought a partnership accounting. Conduct, the reversing opinion said, rather than language employed, is frequently determinative of the existence of a partnership. Heavy stress was laid on the concept that each case must be determined on its own full evidence and factual circumstances, rather than by analogy with other cases. The fact that another case may have contained evidence preponderating against

existence of a partnership "is of no help to defendant" (p. 149) in the appellate Court's review of a new matter. Reversal is to be had where the evidence strongly preponderates against the trial Court's views; and the weight to be given a trial Court's findings in any case is based largely upon its opportunity to judge credibility by seeing and hearing witnesses. (We point out that in the instant case the judicial admissions of O'Donnell, with findings actually based thereon, require no weighing either).

And again, in *Meads v. Stott* (1951), 193 Ore. 509, 238 P. 2d 256, 239 P. 2d 594, the appellate Court, reversing a trial Court judgment that no partnership existed, stressed that despite the "sharp dispute" (p. 513) in the evidence, it was necessary for the reviewing Court to examine a "variety of facts and circumstances" (p. 534). "We have a responsibility to consider and weigh all facts in the case and to arrive at our own independent conclusion as to where lies the truth" (p. 541).

In both those cases, the Oregon Court emphasized that wherever in such matters the evidence strongly preponderated against the trial Court's findings, reversal should be had.

We submit that precisely this situation exists here, and that there should be reversal here also. Appellant has not in any way assumed the existence of a joint venture agreement; he has shown it by his evidence in the trial Court and his analysis of that evidence in this Court. Appellees have given away their case; they cannot do that and have it too. Conflict on minor matters cannot alter this situation, which is fatal to appellees' cause.

## III.

## Plaintiff Is Also Entitled to Prevail in That Under the Law Defendants, Regardless of Partnership Intent, Cannot Take From Him His Own Deal, Discovered and Revealed by Him.

Appellant throughout has repeatedly urged that, even regardless of intent, defendants under general and Oregon law cannot possibly be permitted to discover the deal through plaintiff and then to take it for themselves while shutting him out of it. We submit in all earnestness that the Court's original opinion has not dealt with this contention; that the contention has been raised throughout and is correct; and that the Oregon law is fully as protective of plaintiff's rights as would be any other law. (See App. Op. Br., pp. 88-89, 8-11, etc.; App. Clos. Br., pp. 6-8, 34, etc. We will not repeat this argument in detail, but urge it strongly.

Plaintiff came to defendants not to give away the deal; he came to them to enter into it equally with them. Not even the defendants deny that plaintiff wanted to enter into the deal, and as a principal. They urge, quite simply, that they were nonetheless entitled to enter into it apart from him. This is totally wrong, and we submit respectfully that this Court erred in not dealing with the contention and dealing with it favorably to plaintiff.

When we turn to the case of *Fouchek v. Janucek* (1950), 190 Ore. 251, 225 P. 2d 783, we find quoted the same leading case on the duty of the joint adventurer as was cited in our earlier briefs (App. Clos. Br., p. 34)—*Meinhard v. Salmon* (1928), 149 N. Y. 458, 164 N. E. 545.

Further, we find stated there the general and controlling principle that one cannot preempt the opportunity provided by another, and use it for one's own exclusive profit. It made no difference to the reviewing Oregon Court that further negotiations would have to follow to work out the precise pattern of the deal. The Oregon Court there, as this Federal Court following Oregon law should do here, reversed a lower Court judgment against the plaintiff, and sent back the cause for an accounting of what was due to plaintiff.

This cause was not based on the intention of the parties to deal together—indeed, as here, the defendant at least ultimately lost such intention. He was held accountable because, as here, he intended not to be bound, but to deprive plaintiff of his rights. Nor was the reviewing Court shaken by the thought that the opportunity taken by defendant was not a property right with a precise value readily determinable in advance. Whatever its value, the defendant could not freely take it from the one to whom he owed the duty.

## Conclusion.

We respectfully submit that the original opinion of this Court does not deal with the principal basis of plaintiff's appeal. Applying controlling Oregon law to the factual situation here involved, we have judicial admissions by defendants and factual findings which require judgment for plaintiff on the existence of a joint venture, despite conclusionary findings purporting to deny such joint venture.

Defendants' admissions themselves necessitate reversal. We are confident that re-examination of the controlling admitted facts will lead this Court to the granting of this Petition for Rehearing and the reversal of the judgment of the trial court.

Respectfully submitted,

PRITZKER, PRITZKER, & CLINTON,
STANFORD CLINTON and
LAWRENCE WILLIAM STEINBERG,
*Attorneys for Appellant Harry Joseph.*

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## Certificate of Good Cause.

In the opinion of counsel for plaintiff and petitioner, the within petition for rehearing is well founded; and it is not interposed for delay.

LAWRENCE WILLIAM STEINBERG,
*Attorney for Appellant Harry Joseph.*